IN THE
SUPREME COURT OF MISSOURI

Case No. SC92098

CAROLYNNE M. KIEFFER, APPELLANT

vs.

JENNIFER ICAZA, RAMIRO ICAZA AND DIANNE ICAZA, RESPONDENTS

APPEAL FROM

THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT
HONORABLE MICHAEL MULLEN, CIRCUIT JUDGE

MISSOURI COURT OF APPEALS, EASTERN DISTRICT

SUBSTITUTE BRIEF OF RESPONDENTS JENNIFER ICAZA, RAMIRO ICAZA AND DIANNE ICAZA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

JURISDICTIONAL STATEMENT

Respondent agrees that the jurisdictional statement set out in appellant's brief correctly reflects the jurisdiction in this case.

STATEMENT OF FACTS

Respondents were dissatisfied with the accuracy and completeness of Appellant's Statement of Facts before the Appellate Court. Appellant did not attempt to provide a fair and concise statement of the facts of the case. Except for one sentence, the facts were entirely biased toward Appellant. Even Appellant's procedural history completely excluded the claims filed by Respondents against Appellant. Respondents only supplemented those portions of Appellant's Statement of Facts that were dissatisfactory and relevant. The following is the supplemented Statement of Facts submitted to the Appellate Court.

Respondent will remain consistent with Appellant's Brief and refer to the original Legal File as "LFA" and the new legal file as "LFB." The transcript will be referred to as "TR."

Events Prior to Litigation

On or about July 9, 1998, Appellant and Respondents entered into a lease agreement for a residence to be used by Jennifer Icaza, Respondent. (LFA 9)

Procedural History

Appellant filed a Petition for Breach of Contract and Property Damage against Respondents on or about September 18, 2005. (LFA 7)

On December 31, 2007, the Presiding Judge of the Circuit Court of the City of St. Louis reassigned the case to Judge Michael Mullen, effective January 1, 2008. (LFA 5) On February 13, 2008, the Parties appeared in Division 28 for trial on the merits of this contested case before Judge Michael Steltzer, who entered an order granting Plaintiff's previously filed Motion for Change of Judge, and the case was reassigned to Judge Michael Mullen for immediate hearing. (LFA 92) The Honorable David L. Dowd signed the order reassigning the case to Judge Michael Mullen, who heard the case on the same day. (LFA 92)

Appellant filed Plaintiff's Motion for Jury Trial, which was date stamped February 8, 2008, at 6:44 and 6:51 p.m. (LFA 85-86) Respondents' attorney, Kenneth McManaman, received the fax of Appellant's Motion for Jury Trial on February 9, 2008, with no date stamp, and received the same by mail, postmarked February 9, 2008. On February 13, 2008, the court took up and denied the Motion for Jury Trial, finding "the motion was improperly filed and that [Appellant] did not send a copy of that motion to both of the counsels that were listed as counselors for the Defendants in this case." (TR 4)

The trial was held and evidence adduced on February 13, 2009, and the case was taken under submission. (LFA 104, TR 1-2, 196-97) On February 14, 2008, Appellant filed a memorandum with the Circuit Court, and attached several exhibits she stated were "inadvertently omitted from the file at the conclusion of Defendants' testimony of yesterday's date." (LFA 105-114-a)

On March 6, 2008, Appellant filed a Motion Requesting the Court to Declare Trial Held on February 13, 2008, as a Mistrial. (LFA 115-121)

On May 29, 2008, the Honorable Michael K. Mullen entered his Final Judgment, and denied Plaintiff's Motion to Disqualify Andrea Weiss, denied Plaintiff's Motion for Interlocutory Order of Default, and judgment in favor of Defendants on Plaintiff's Petition, and judgment in favor of Plaintiff on Defendants' Counter Claim. (LFA 122)

On June 30, 2008, Appellant filed a Motion for New Trial, and/or to Declare Mistrial, or to Set Aside or Vacate this Court's Order of May 29, 2008. (LFA 123) On July 1, 2008, a Judgment Nunc Pro Tunc was entered. (LFA 127)

Notice of Appeal was then filed by Appellant on September 24, 2008. (LFA 128)

This Honorable Court remanded the case to the circuit court with directions that the judge who rendered the purported May 29, 2008 judgment shall set a date on which he shall enter an order setting aside the May 29, 2008 judgment, treat the

case as finally submitted on said new date, and enter such judgment as he shall deem proper within the period prescribed by Section 517.111.2. Keiffer v. Jennifer Icaza, et. al., ED91742 at 4 (the first appeal in this case, which has been consolidated herewith). With regard to Appellant's claim that the trial court improperly denied her motion for jury trial, this Honorable Court further noted, in footnote 4 of the same opinion, "While we do not reach this point, we note that the record demonstrates that Plaintiff failed to file her motion within five days of the date set for trial. Section 517.091.1 RSMo (2000); Rule 44.01(a).", and that Plaintiff was not required to serve her jury trial request on both Defendants' attorneys. Id.

On February 11, 2010, Judge Michael Mullen entered his order setting aside the May 29, 2008 judgment in compliance with this Honorable Court's opinion, and allowed the Parties until February 26, 2010 to file proposed judgments. (LFB 16) On February 19, 2010, Appellant filed a Motion for Judge Michael Mullen to Recuse Himself, based upon an alleged and unproved ex-parte contact with attorneys for Defendants, which was denied on February 22, 2010. (LFB 4, 17-19). Appellant filed her proposed judgment and a Motion to Reconsider the denial of her Motion for Judge Mullen to recuse himself. (LFB 25).

Judge Mullen entered his final Judgment on March 3, 2010. (LFB 32-35) Appellant filed a Motion for New Trial and/or to Vacate and Set Aside Judgment

of March 3, 2010, which was taken up and denied. (LFB 3, 36-53, 107) Appellant then filed a Motion Requesting Hearing to the Presiding Judge to View Ex Parte Communication and Disqualify the Judge, and filed a subpoena to have Judge Mullen appear in front of the Presiding Judge for hearing on her Motion. (LFB 2, 121-22). Attorney for Defendants filed a Motion and Memorandum denying any ex-parte contact (LFB 113-118) and Judge Mullen filed a Motion to Quash and Memorandum in support. (LFB 123-131) The matter was heard by Judge David Dowd and the Motion to Quash was sustained. (LFB 132)

This appeal followed.

Factual History

(to supplement the statement in Appellant's Brief)

At trial, Appellant offered no proof or other corroborating evidence or testimony to support any of her claims of damages. (TR 50-52) Even if Appellant had such evidence with her, which she did not, she was precluded from presenting it based upon her failure to comply with the court's order compelling discovery responses. (TR 50-52) Likewise, Appellant did not, and could not, produce an itemized list of damages or the notice of inspection, which she was required to provide to Respondents pursuant to Missouri law. (TR 59-62)

Testimony was presented that Respondents reported problems with the washer and alarm system. (TR 63) Upon cross examination, Appellant could not

show where her lease allowed her to charge additional fees for meeting the utility companies at the property to turn the services on. (TR 68)

Respondent, Jennifer Icaza, who was the tenant living in the condominium, also provided testimony upon which the court necessarily relied in its judgment. Ms. Icaza testified that Appellant volunteered to meet the utility workers at the condominium to turn on the services, and that was no a demand of Respondent. (TR 77). Ms. Icaza further testified that she and a law school classmate returned home from school for lunch on one occasion to find Appellant and another unknown man going through her personal belongings. (TR 85, 93) She further testified that her father was worried about her safety because of this incident, which caused her to know she had to leave the condominium, and that Appellant would not leave the condominium until Respondent called the police. (TR 85,93)

Ms. Icaza testified that Appellant would enter her apartment when she was out and leave letters for her in the middle of the living room floor complaining that respondent had left the lights and air conditioning on and for how long they had been left on. (TR 86-87) Respondent testified she was scared for her safety. Respondent also testified that she got a dog with Appellant's permission and paid a pet deposit. (TR 101)

Ms. Icaza also testified that the reason she left the apartment was because of Appellant's actions in making it unbearable for her to live in the condominium

without fearing for her safety. She testified that she would come home and find her things disordered and her drawers and cabinets open, as though Appellant wanted her to know she had been there. Her door would be opened when she came home in the late evening and she never knew what she would come home to. These actions of Appellant caused her to be scared and she could not sleep in that apartment. She also testified that Appellant was the only other person who had access to her condominium. (TR 97-99)

ARGUMENT

POINT I

The Trial Court did not err in assigning the case to Judge Michael Mullen after Judge Michael Steltzer granted Plaintiff's Motion for Change of Judge, and this Court should deny Appellant's First Point, because:

(a) Judge Michael Steltzer acted in accordance with Rule 51.05(e); and

(b) Appellant did not preserve this issue for appeal.

Respondents' response to Appellant's Point I is the same as was submitted to the Appellate Court.

In Appellant's first Point, she alleges the trial court erred when Judge Michael Steltzer "assigned" the case to Judge Michael Mullen in violation of Rule 51.05(e). However, Judge Michael Steltzer acted in accordance with Rule 51.05. It is important, first, to point out that Appellant does not allege in her first Point

Relied On that Judge Steltzer acted improperly in granting her Motion for Change of Judge, although some of the argument seems to suggest the same.

Although somewhat confusing, Appellant specifically alleges that the error committed was that Judge Steltzer did not follow Rule 51.05(e) when he (1) failed to allow the parties to stipulate to a new judge, (2) selected a judge of his own choosing (Judge Mullen) and failed to consult that judge to see if he would be willing to take the case, and (3) went to Judge David L. Dowd, who was not the "presiding judge," for his signature on the reassignment to Judge Mullen.

Rule 51.05(e) states that the "judge shall sustain a timely application for change of judge upon its presentation. The disqualified judge shall transfer the case to a judge stipulated to by the parties if the new judge agrees to take the case. If the case is not so transferred, the disqualified judge shall notify the presiding judge" and if "the presiding judge is not disqualified in the case, the presiding judge shall assign a judge of the circuit who is not disqualified or request this Court to transfer a judge…."

Here, Judge Steltzer granted Appellant's application for change of judge. There was no agreement of the parties on another judge to transfer the case to. Appellant does not allege that there was any such stipulation that was denied. In fact, there was no such agreement or stipulation by the parties. Since there was no stipulation by the parties, there was no need to get Judge Mullen's consent. Even

if consent was required, the fact that he took the case and heard it demonstrates that he did, in fact, consent. Appellant offers no evidence that Judge Mullen did not consent.

Since there was no stipulation of the parties, Judge Steltzer properly took the matter to Judge David Dowd for assignment to Judge Mullen. This was done in accordance with Rule 51.05(e). Appellant states that Judge Dowd was not the presiding judge, and that is where the error lies. However, Appellant has no evidence that Judge David Dowd was not acting as presiding judge at that time. In fact, the only evidence is that Judge Dowd was acting as presiding judge at that time. It is common practice in the St. Louis City Circuit Court for a judge, other than the Presiding Judge, to act as presiding judge, especially in matters of setting cases for trial. This principle is set forth, for example, in local rule 36.8, "Presiding Judge, Construction. Whenever reference is made in Rule 36 to Presiding Judge, the same shall be construed to include any judge presiding in Division No. 1 by assignment or request of the Presiding Judge of the Circuit Court." Even in this case, when Appellant requested a post-trial hearing to remove Judge Mullen as judge on the case before the Presiding Judge, and attempted to subpoena Judge Mullen before the Presiding Judge, it was Judge Dowd that heard and ruled on the motion. There is no reason to believe that Judge Dowd was not acting as presiding judge when he signed the order assigning the case to Judge

Mullen. In fact, there would have been no reason for Judge Steltzer to take the order to Judge Dowd unless Judge Dowd was acting as presiding judge in assigning the case to Judge Mullen.

The final piece of Appellant's argument is that Judge Steltzer was actually the judge that assigned Judge Mullen, and not the presiding judge. However, no matter who wrote the order, the presiding judge entered the order, thereby endorsing the order and making it his own.

Appellant cites no case law that actually supports her argument. All of the cases cited by Appellant are distinguishable from this case in that the cases cited all deal with a factual situation in which the trial judge denied a party's application for change of judge. See State of Missouri ex rel. Donna Susette Riggleman, Realtor, v. Honorable Joseph R. Briscoe, ED88614 (Mo. App. E.D. 2006) and State of Missouri ex. Rel. Carol Eckelkamp, et al. v. The Honorable David C. Mason, ED94859 (Mo. App. E.D. 2010). Here, Judge Steltzer granted Appellant's application for change of judge. The law established in the cases cited is not relevant to the issues in this appeal.

Finally, it is important to note that this is the first time this issue has been raised by Appellant. When the case was heard in front of Judge Mullen, Appellant did not make any application for change of judge from Judge Mullen before the case was heard. Appellant has filed multiple post-trial motions, but not of those

motions alleged a violation of Rule 51.05(e). Furthermore, Appellant did not raise this issue on her first appeal. There was no new trial, so nothing changed post remand from this court on the first appeal for a technical error that affected the assignment of the Judge in this case. In fact, this Court specifically remanded the case back to Judge Mullen to enter a new judgment. The "law of the case" rule requires that Appellant not be allowed to raise this issue for the first time on this second appeal. See Goodwin Creason, Administering Surviving Partner of the Partnership Firm of Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d 1179 (Mo. 1939).

Appellant's first point should be denied because Judge Steltzer and Judge Dowd acted appropriately and in accordance with the Rules in assigning the case to Judge Mullen, and Appellant failed to raise this issue or preserve it for appeal. Even if there was any error, Appellant was not prejudiced thereby.

POINT II

The trial court did not err in failing to assign the case to Division 29, and this Court should deny Appellant's second point, because:

(a) There was no proper request for jury trial in this case, and therefore no reason for the trial court to assign the case to Division 29 in accordance with Local Rules 6.1.1.1, 6.1.1.5, and 6.1.1.6;

(b) Appellant failed to state, incorporate or apply any facts of the case in her argument on point two, and any facts implied are not correct; and

(c) Appellant failed to raise this issue previously or preserve it for appeal.

Respondents' response to Appellant's Point II is the same as was submitted to the Appellate Court.

In her second point, Appellant argues that Judge Mullen, who sat in Division 27, erred by not transferring the case to Division 29 pursuant to local rule 6.1.1.1. Local rule 6.1.1.1 states, in relevant part, "Any case pending in Division 27 in which a jury trial has been requested shall be heard in Division 29." Appellant correctly states this rule, however, she incorrectly states the facts.

This case was properly assigned to Division 28 for a contested trial on February 13, 2008. (Rule 6.1.1.6 states that cases assigned to Division 27 which are contested but not jury trials shall be heard in Division 28.) However, on that date, Judge Steltzer in Division 28 granted Appellant's application for change of judge, requiring a new judge to be assigned. (LFA 92) The judge assigned was Judge Mullen, who at that time, normally sat in Division 27. Judge Mullen presided over the trial, which was actually conducted in Division 28. (TR 2)

Appellant states that Judge Mullen should have transferred the case to Division 29 for trial. Although she does not actually state this fact in her argument, Appellant is necessarily alleging that a request for jury trial had been made to require the transfer to Division 29. However, no proper request for jury trial was made by any party in this case. See Keiffer v. Icaza, ED 91742 at FN4.

Appellant filed an application for jury trial; however, it was not timely filed. Id. Appellant raised that issue on first appeal and did not raise it again on this appeal. There was no jury trial in this case, nor was there a proper request for a jury trial. Therefore, there was no need for Judge Mullen to transfer the case to Division 29.

Also, it is important to note that this is the first time this issue has been raised by Appellant. When the case was heard in front of Judge Mullen, Appellant did not make any application for change of judge from Judge Mullen before the case was heard, nor did she make any objection that the case should have been transferred to Division 29. Appellant has filed multiple post-trial motions, but none of those motions alleged a violation of Local Rule 6.1.1.1. Furthermore, Appellant did not raise this issue on her first appeal. There was no new trial, so nothing changed post remand from this court that affected the assignment of the Division in this case. In fact, this Court specifically remanded the case back to Judge Mullen to enter a new judgment. The "law of the case" rule requires that

Appellant not be allowed to raise this issue for the first time on this second appeal. See Goodwin Creason, Administering Surviving Partner of the Partnership Firm of Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d 1179 (Mo. 1939).

Appellant's point two should be denied because there was no error by failing to transfer the case to Division 29 because there was no proper request for jury trial, and Appellant failed to raise this issue or preserve it for appeal. Even if there was any error, Appellant was not prejudiced thereby. Furthermore, Appellant's Argument is not in the proper form in that it fails to state or incorporate any facts of the current case.

POINT III

The trial court did not err by imposing sanctions against Appellant for failure to comply with an Order to compel responses to discovery, and this Court should deny Appellant's third point, because:

(a) The trial court was well within its discretion to enter the Order compelling Appellant to comply with discovery requests and subsequent sanctions for her failure to comply with said Order;

(b) Appellant incorrectly sets forth the standard of review and incorrectly states Local Rule 32.6; and

(c) Appellant did not previously raise this issue or preserve it for appeal.

Respondent's response to Appellant's Point III is the same as submitted to the Appellate Court, with the addition of some new argument regarding Rule 33.5.

Appellant's third point is confusingly presented. The stated crux of Appellant's third point is that Judge Mullen did not have jurisdiction to impose sanctions against Appellant for failure to comply with an order to compel discovery responses because Respondents' Motion to Compel did not comply with Local Rule 32.6(1). In her argument, Appellant states the trial court "exceeded its jurisdiction" in violation of Rule 32.6(1). She further states that the trial court "erroneously declared and applied the law with regard to imposing sanctions on matters involving discovery in violation of Local Rule 32.6(1).

Local Rule 32.6(1) states, in relevant part, "Motions concerning matters arising in the course of discovery pursuant to any Supreme Court Rule shall separately set out in full each question together with any response, objection or other matter material thereto, so that the Court may consider and rule on each question without referring to any other matter in the Court file." Local Rule 32.6(2) goes on to state, "The Court may on its own motion and without extending the times provided by the Supreme Court Rules deny any motion which fails to comply with this rule, and on motion of any opposing party the Court may similarly deny the motion and make further order authorized by Supreme Court Rule."

Appellant cites the first subsection of Local Rule 32.6, but she completely omits the second subsection. Clearly, the trial court cannot violate Local Rule 32.6(1), nor can it exceed its jurisdiction with regard to that subsection, because that subsection is a requirement for Parties, not the court. Appellant alleges that Local Rule 32.6(1) somehow limits the jurisdiction of the trial judge. Appellant's argument is, on its face, not a correct statement of the law or application thereof.

Appellant also alleges that Respondents' Motion to Compel was not in the form required by Local Rule 32.6(1), and therefore, the order of October 18, 2007 (requiring Appellant to comply with discovery responses by December 6, 2007) and the sanctions imposed for failure to comply with the October 18, 2007 order, were erroneously entered. Appellant is essentially arguing that the trial court is required to deny a motion that is not in compliance with Local Rule 32.6(1). That is simply not a correct statement of the rule. Local Rule 32.6(2) gives the trial court discretion to deny a request that is not in compliance with Local Rule 32.6(1), but does not require it to be denied.

In this case, Respondents filed a Motion to Compel on September 20, 2007. (LFA 48) The trial court ruled, granting the Motion on October 18, 2007. (LFA 58) At that time, Appellant had not responded, in any way, to Respondents' discovery requests in over 120 days. (LFA 48) Under those circumstances, the trial court was well within its discretion to grant Respondents' Motion to Compel.

Appellant was given until November 8, 2007, in which to "completely answer (Respondents') interrogatories and to provide the requested documents in (Respondents') Request for Production." (LFA 58) Appellant failed to completely answer Respondents' requests for production by November 8, 2007, however, and on that date, the trial court entered a new order requiring Appellant to completely respond to specific interrogatories and requests for production by December 6, 2007, and stating that any documents not produced or answers not provided by that date would not be admissible at trial. Upon a finding that said documents were not provided by said date, the trial court imposed the sanctions and excluded said evidence from trial. (TR 27) Under these circumstances, the trial court was well within its discretion to grant Respondents' Motion to Compel and to impose sanctions for Appellant's failure to comply with the court's order.

It is also worth noting that although appellant states in her argument that she responded to discovery on December 6, 2007, Appellant's point three does not allege that this fact is the basis for the trial court's error. Even if it was, the evidence and the court's finding, was that the responses were not made by the deadline.

Finally, it is important to note that this is the first time this issue has been raised by Appellant. Appellant has filed multiple post-trial motions, but not of those motions alleged a violation of Rule 32.6(1). Furthermore, Appellant did not

raise this issue on her first appeal. There was no new trial, so nothing changed post remand from this court on the first appeal that affected the trial court's order regarding discovery before the trial. The "law of the case" rule requires that Appellant not be allowed to raise this issue for the first time on this second appeal. See Goodwin Creason, Administering Surviving Partner of the Partnership Firm of Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d 1179 (Mo. 1939).

Appellant's third point should be denied because the trial court acted within its discretion when it imposed sanctions against Appellant for failure to comply with its order regarding discovery. Furthermore, Appellant incorrectly states and applies the law as well as the standard of review on this point. Appellant also failed to raise this issue previously and did not preserve it for appeal.

Furthermore, Appellant raises an argument not previously raised before the trial court or the Appellate court on either appeal. Appellate states that Local Rule 33.5 prevented the trial judge from ordering sanctions regarding discovery. With this argument, Appellant has altered the basis of her claim in Point III in violation of Rule 83.08(b), and this Honorable Court should dismiss this point on that basis. However, even if this Court considers Appellant's argument, it still fails because the trial court had previously issued an order that Appellant's evidence would be excluded at trial if Appellant did not fully comply with the court's discovery order.

Appellant was not "surprised" by Respondents' request at trial, because Appellant already had notice from the court's previous order.

POINT IV

The trial court did not err when the Division 28 Judge assigned the case to Judge Mullen in Division 27, and this Court should deny Appellant's fourth point, because:

(a) The Judge in Division 28 did not lack jurisdiction to assign the case to grant a change of judge;

(b) The point is substantially the same as points one and two, which should be denied and have already been discussed herein;

(c) Appellant fails to cite any law in support of her argument;

(d) Appellant failed to raise this issue previously or preserve it for appeal; and

(e) Appellant was not prejudiced by any error that occurred by the granting of her own motion for change of judge.

Respondents' response to Appellant's Point IV is the same as submitted to the Appellate Court.

Much of appellant's fourth point is a restatement of points one and two. As discussed in those points herein, Appellant did not make a proper request for jury trial and the case was not required to be transferred to Division 29 under local

rules. The only new argument presented in point four is that Judge Steltzer lacked jurisdiction to grant Appellant's application for change of judge because Appellant had withdrawn her application for change of judge.

In support of her argument, Appellant cites the case State ex rel. Springfield Underground, Inc., Relator v. The Honorable J. Miles Sweeney, Respondent, SC84667 (Mo. 2003). A thorough review of this case cannot reveal any statement of law or fact that is relevant to appellant's point. The case cited is based on a mechanic's lien issue, and the Supreme Court took it up under a Writ of Prohibition after the trial court overruled a Motion to Dismiss/Motion for Summary Judgment when the property description on the mechanic's lien was insufficient to describe the property. There is nothing about that case relevant to this appeal. Therefore, Appellant has provided no case law or other authority to support her argument.

Appellant filed a motion for change of judge and Judge Steltzer granted it. Even if Appellant had tried to withdraw her motion, Judge Steltzer could have recused himself or granted a change of judge for any number of reasons. Either way, the granting of a change of judge would not deprive the court from jurisdiction, as alleged by Appellant.

Appellant claims that she was prejudiced in that the court's granting of her motion for change of judge removed her automatic right to change of judge under

Judge Mullen. Even if Judge Steltzer did grant Appellant's Motion for change of judge in error, Appellant was not prejudiced by it. She did not even try to request a change of judge from Judge Mullen prior to trial, and now she claims the loss of a right she did not try to exercise is reversible error. If Appellant did not want Judge Mullen to try her case, she could have tried to make a motion for change of judge, but she did not. Furthermore, nothing in Appellant's Motion for Change of Judge indicates that the Motion was specific to Judge Mullen. (LFA 83)

Also, it is important to note that this is the first time this issue has been raised by Appellant. When the case was heard in front of Judge Mullen, Appellant did not make any application for change of judge from Judge Mullen before the case was heard. Appellant has filed multiple post-trial motions, but did not allege this error. Furthermore, Appellant did not raise this issue on her first appeal. There was no new trial, so nothing changed post remand from this court on the first appeal that affected the assignment of the Judge in this case. In fact, this Court specifically remanded the case back to Judge Mullen to enter a new judgment. The "law of the case" rule requires that Appellant not be allowed to raise this issue for the first time on this second appeal. See Goodwin Creason, Administering Surviving Partner of the Partnership Firm of Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d 1179 (Mo. 1939).

POINT V

The trial court did not err in entering a judgment against Appellant, and Appellant's fifth point should be denied, because:

(a) The judgment was not against the weight of the evidence and there was sufficient evidence to support the judgment, and

(b) Appellant failed to comply with Rule 84.04 in that she omitted all facts in her Statement of Facts and otherwise in her brief that tended to support the judgment entered by the trial court.

Respondents' response to Appellant's Point V is the same as submitted to the Appellate Court.

In her fifth point, Appellant argues that the court's judgment was against the weight of the evidence because Appellant made a prima facie case. However, Appellant's argument is completely composed of summary statements and is otherwise vague, and does not include a single statement of any fact in support of her conclusive and vague assertions (although it does cite where in the record these facts, presumably, may be found).

In her statement of facts, and in her argument, Appellant completely neglects to state any facts which would tend to support the judgment of the court; facts upon which the trial court necessarily relied upon in its ruling. Therefore, the Respondent and this Court are forced to scour the record on their own to determine if there are facts to support the judgment.

Pro se appellants are bound by the same rules of procedure as those admitted to practice law and are not entitled to indulgence they would not have received if represented by counsel. Thomas v. Flagstar Bank, FSB, 299 S.W.3d 311, 313 (Mo. App. S.D. 2009). Rule 84.04 requires an appellant's brief to contain "a fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). Appellant's omission of facts necessarily relied upon in the trial court's ruling is not only a violation of Rule 84.04(c), but it is "often viewed as an admission that if the Court was familiar with all of the facts, the appellant would surely lose." Darren Prather v. City of Carl Junction, Missuori, SD30470 (Mo. App. S.D. 2011), citing Evans v. Groves Iron Works, 982 S.W.2d 760, 762 (Mo. App. E.D. 1998). Appellant's failure to comply with Rule 84.04 impedes this Court's ability to reach a disposition on the merits to such an extent that this Court cannot conduct a meaningful review without improperly advocating for the appellant. See First Bank v. The Annie-Joyce Group, LLC, et al., ED95034 (Mo. App. E.D. 2011).

Appellant's point five (and entire brief) should be dismissed because of Appellant's failure to abide by Supreme Court Rules with regard to statements of facts and the way point five was drafted. However, if the Court does not dismiss Appellant's brief or point five based upon this failure, Appellant's point five

should still be denied, because the trial court's judgment is not against the weight of the evidence, and there is sufficient evidence to support the court's judgment.

At trial, Appellant offered no proof or other corroborating evidence or testimony to support any of her claims of damages. (TR 50-52) Even if Appellant had such evidence with her, which she did not, she was precluded from presenting it based upon her failure to comply with the court's order compelling discovery responses. (TR 50-52) Likewise, Appellant did not, and could not, produce an itemized list of damages or the notice of inspection, which she was required to provide to Respondents pursuant to Missouri law. (TR 59-62)

Testimony was presented that Respondents reported problems with the washer and alarm system. (TR 63) Upon cross examination, Appellant could not show where her lease allowed her to charge additional fees for meeting the utility companies at the property to turn the services on. (TR 68)

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testified that her father was worried about her safety because of this incident, which caused her to know she had to leave the condominium, and that Appellant would not leave the condominium until Respondent called the police. (TR 85,93)

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Ms. Icaza also testified that the reason she left the apartment was because of Appellant's actions in making it unbearable for her to live in the condominium without fearing for her safety. She testified that she would come home and find her things disordered and her drawers and cabinets open, as though Appellant wanted her to know she had been there. Her door would be opened when she came home in the late evening and she never knew what she would come home to. These actions of Appellant caused her to be scared and she could not sleep in that apartment. She also testified that Appellant was the only other person who had access to her condominium. (TR 97-99)

This is not a complete statement of all of the facts in the record which tend to support the trial court's judgment, but it provides sufficient evidence that the

trial court's judgment was not against the weight of the evidence and there was sufficient evidence to support the judgment. Therefore, Appellant's fifth point should be denied.

POINT VI

The Appellate Court, Eastern District, did not err when it applied the law of the case doctrine to arguments made in Appellants' Points I, III, IV, and V.

Appellant argues that the law of the case doctrine should not apply to the points she raised on her second appeal, but failed to raise in her first appeal, because the first appeal was from a void judgment, and therefore her appeal was properly before the Court of Appeals on the second appeal. This argument fails.

This Court held in Williams v. Kimes, 25 S.W.3d 150, 153-54 (Mo. banc 2000), "The decision of a court is the law of the case for all points presented and decided, as well as all matters that arose before the first adjudication and might have been raised but were not. According to the law of the case doctrine, failure to raise points in a prior appeal means that a court later hearing the case need not consider them. Appellate courts have discretion to consider an issue where there is a mistake, a manifest injustice, or an intervening change of law."

Here, there was no mistake, manifest injustice, or and intervening change of law. Furthermore, these issues might have been raised on the first appeal, but were

not. With regard to Points I, III, and IV, these points should have been raised on the first appeal, because they deal with error prior to judgment, or even trial, that Appellant alleges also render the judgment void. For the appellate court to appropriately consider the need for remand and to make an appropriate mandate, these issues would have been necessary. If not raised on the first appeal, where Appellant was arguing the judgment was void because the judgment was not entered timely, a great judicial inefficiency is created.

If Appellant's argument stands, it would create a situation where an appeal is taken because of a void judgment, remanded to the trial court, appealed again because the judgment is void, remanded to the trial court, and so on. In the interest of judicial efficiency, if nothing else, the argument that a judgment is void, or would be void even upon remand to the trial court, should be raised at the first possible opportunity. These issues should have been raised on the first appeal.

Therefore, the Appellate Court did not err in applying the law of the case doctrine.

POINT VII

The Court of Appeals, Eastern District, did not err when they denied Appellant's Point II for reasons of timeliness because Appellant's request for a jury trial was not timely under Rule 44.01, and Appellant's Point VII should

be denied because it raises issues that were not raised in the appeal before the Appellate Court.

Appellant did not raise this issue on her second appeal before the Appellate Court, and the basis for this argument was not in Appellant's Brief before the Appellate Court. Again, Appellate has altered the basis of her claim as it was raised in the court of appeals, and should therefore be dismissed. To the extent this issue was raised at the Appellate Court, it is the basis of Appellant's Point II and is appropriately taken up as the same Point.

Furthermore, the logic set forth in Point VII fails. Appellant correctly states Rule 43.01(g), that "when provision is made for the time of filing papers and none is made for the time of service thereof, copies shall be served on the day of filing or as soon thereafter as can be done." However, Appellant then argues that this rule somehow is in conflict with Rule 44.01(a) because RSMo 517.091.1, she states, "does not makes (sic) provision for the time of filing the request for jury trial, but makes no provision for the time of service thereof." RSMo 517.091 specifically sets forth a minimum time period for filing a written request for jury trial. Appellant is correct, however, that is makes no provision for the time of service thereof. Rule 43.01(g) clarifies that service should be made at the same time as filing. Rule 44.01(a) further clarifies that the time for filing, since less than seven days, shall exclude Saturdays, Sundays and legal holidays in the

computation of the five day period. The statutes and rules are in no way conflicting with one another. They help provide clarity to each other. And Appellant's request for a jury trial was not filed timely, because Appellant did not give five days notice, excluding Saturday and Sunday, from the date she filed (February 8) and the date of trial (February 13).

POINT VIII

Respondents request this court to dismiss this Appeal because Appellant failed to significantly or substantially comply with Rule 84.04.

Respondents' Pont VIII is the same as Point VI in Respondents' Brief before the Appellate Court.

"Claimant is a pro se litigant. She is, nevertheless, held to the same standards as are attorneys and must comply with the Supreme Court's rules of procedure." Carlson v. Healthcare Services Group, Inc., 275 S.W.3d 382, 384 (Mo. App. S.D. 2009); citing Ward v. United Engineering Co., 249 S.W.3d 285, 287 (Mo. App. E.D. 2008). "Judicial impartiality, judicial economy, and fairness to all parties necessitates that [the Court] do(es) not grant pro se appellants preferential treatment with regard to their compliance with those procedural rules. Ward, 249 S.W.3d at 287.

Missouri Supreme Court Rule 84.04(c) requires the statement of facts in an appellant's brief on appeal be "a fair and concise statement of the facts relevant to

the questions presented for determination without argument." "The primary purpose of the statement of facts is to afford an immediate, accurate, complete and unbiased understanding of the case." See, Washington v. Blackburn, ED 91610, at 1-2 (Mo. App. E.D. 2009); citing In re Marriage of Shumpert, 144 S.W.3d 317 (Mo. App. E.D. 2004). A violation of Rule 84.04(c), standing alone, constitutes grounds for dismissal of an appeal. See, Shumpert, 144 S.W.3d at 320; Lemay v. Hardin, 108 S.W.3d 705, 709 (Mo. App. W.D. 2003).

Appellant's Brief fails to comply with Rule 84.04(c) in that Appellant's Statement of Facts is unfair and biased in that Appellant failed to include any fact from the record that would tend to support the trial court's judgment, even though one of her points on appeal was that the judgment was against the weight of the evidence or was not supported by the evidence. Appellant's omission of facts that could support the judgment has caused the Respondent to scour the record to identify these facts, and to rewrite the statement of facts in this appeal. This Court will be required to do the same, essentially becoming an advocate for the Appellant. Therefore, this appeal should be dismissed for Appellant's failure to comply with Rule 84.04.

CONCLUSION

Respondents pray that this Court will affirm the Judgment of the Appellate Court and Circuit Court and deny Appellant's Points on appeal. Appellant's

failure to substantially follow Rule 84.04 should be dispositive in this case, and cause the Appeal to be dismissed. Appellant's Points on Appeal are substantially precluded by the rule of the case doctrine. However, even if the rule of the case doctrine does not apply to any of the Points, the Circuit Court's judgment should still be affirmed. Appellant has not correctly cited any statute, rule or precedent that would justify the remand of the procedural points to the Circuit Court. Furthermore, although Appellant did not include all the facts that tend to support the trial court's substantive judgment, the judgment is supported by the evidence, and the judgment of the Circuit Court should be affirmed.

Respectfully Submitted,

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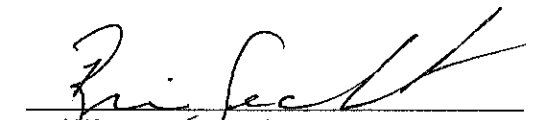
RULE 84.06 CERTIFICATION

I, Brice R. Sechrest, certify that this brief complies with the limitations contained in Rule 84.06 and contains approximately 7,813 words.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Brice R. Sechrest, certify that a true copy of this Brief was served to the Appellant through the ECF filing system on the 3rd day of April, 2012.

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